FEDERAL INCORPORATION

II.

WE have traced in the foregoing part the principal cases bearing directly upon the federal power of incorporation. To gain a just perspective of the attitude the court may take upon the constitutionality of an act requiring uniform federal incorporation of all businesses engaged in interstate commerce it is necessary to complete our review by an examination of the trend of the court's decisions involving other portions of the field of commerce regulation. The construction placed upon acts exerting other forms of regulation will not be so conclusive to our inquiry as the adjudication of the cases reviewed in the foregoing section, but by exhibiting the general trend of the judicial reasoning upon the subject of the commercial power it will provide us with a wider basis of judgment. We shall first examine the development of the Congressional control over foreign commerce, and following, its regulation of the various instrumentalities and objects of interstate commerce.

From the earliest period of our constitutional development the power of Congress over foreign commerce has been held complete and unlimited within the field upon which it operates. The full extent of the power was relied upon by the act of Congress of December 22, 1807, whereby an embargo was laid upon all sea-going vessels then in ports or harbors of the United States. No act of regulation of commerce could be more drastic. Its practical effect was a prohibition of all foreign commerce and that was the effect contemplated by the Congress which enacted it. Yet its constitutionality was never questioned before the Supreme Court of the United States. The only adjudication upon the constitutional validity of the law came from the United States District Court of Massachusetts in the case of the *United States* v. *The William*.[1] In a long and able opinion in that case Judge Davis set forth very clearly the nature and scope of the regulatory power in Congress over foreign commerce. He regarded it from the lofty view point of national interests. The argument had been advanced, he said, that the "Power to regulate * * * cannot be understood to give a power to annihilate." * * * "Let this be admitted," he answered, "and are they (Congress) not at liberty to consider the present prohibitory system as necessary and proper to an eventual beneficial regulation?

[1] 28 Fed. Cases 614.

On the abstract question of constitutional power I see nothing to prohibit or restrain the measure."

"Further," the learned judge continues, "the power to regulate commerce is not to be confined to the adoption of measures exclusively beneficial to commerce itself, or tending to its advancement; but, in our national system * * * it is also to be considered as an instrument for other purposes of general policy and interest." "The situation of the United States, in ordinary times, might render legislative interferences, relative to commerce, less necessary; but the capacity and power of managing and directing it, for the advancement of great national purposes seems an important ingredient of sovereignty."[2] Words such as these must give heart to those who see in the Constitution not a rigid code of law but a declaration of guiding principles and a provision of forms and means of organized authority which are intended to serve rather than to shackle the growth of a great nation. It is true this opinion did not emanate from the highest tribunal to which is entrusted the interpretation of the Constitution. But it was never overthrown by that court; and that it should have been acquiesced in immediately is some evidence that it was prevalently regarded as sound.

This broad construction was placed upon the Constitutional control over foreign commerce in 1808. Not until 1903 by a case involving tariff legislation was the extent of that power again called in question. An Act of Congress of March 2, 1897, provided for standardizing, by administrative determination, the quality of teas imported. In the case of *Buttfield* v. *Stranahan*[3] the plaintiff had attempted to introduce a grade inferior to that permitted by the official regulations. It was seized and destroyed. The court in deciding against the plaintiff declared: "As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised." The court concluded: "It results that a statute which restrains the introduction of particular goods into the United States from considerations of public policy does not violate the "due process" clause of the Constitution." It is clear from this decision that the court has not renounced the broad construction put upon the

[2] It must be kept in mind that these words were used respecting authority over extraterritorial and not internal trade. Comment upon this important distinction will be found, infra, p. 150, et seq.

[3] 192 U. S. 470.

commerce power in the early case of the *United States* v. *The William* and since then generally accepted.[4] It affirms and gives the highest sanction to that view of the commerce power which henceforth may be taken as incontestable with regard to foreign intercourse.

Congress exercised its authority in a more restricted field by forbidding the importation of opium in an Act of February 9, 1909. In conformity with the trend of the decisions already mentioned it was held in *Brolan* v. *United States* that it was "frivolous to question the power of Congress to prohibit importations."

It appears then that Congress may exercise this power not only for the purpose of conserving the health, comfort, safety, and morals of the people, but for the purpose of public policy, to promote trade in certain quarters, to favor certain lines of industry to the detriment of others. And further it appears that for those purposes it may use what means it deems best fitted for their attainment even to absolute prohibition, providing only[6] that the restriction operates equally upon all who are engaged, or who attempt to engage, in the business so regulated. This is the ground upon which all tariff acts from the first slightly protective measures of 1789[7] to the present day have been tacitly supported by the adjudication of cases involving their specific provisions,[8] since the power to levy duties and tolls as such presumably does not extend beyond what is necessary for revenue purposes.[9]

The control exercised by Congress over immigration tho resting at least in part upon its power to regulate foreign commerce need hardly attract our detailed attention, since it has generally been held by the court to be "an incident of sovereignty" springing from the

[4] An interesting case involving the authority of Congress over foreign commerce was presented in The Abbey Dodge (223 U. S. 166). The vessel had been employed in gathering sponges during a certain period within a prescribed area in the Gulf of Mexico in violation of an act of Congress. The court said: "the vessel was engaged in foreign commerce and was therefore amenable to the regulating power of Congress over that subject. * * * The practices from the beginning, sanctioned by the decisions of this court establish that Congress by an exertion of its power to regulate foreign commerce has the authority to forbid merchandise carried in such commerce from entering the United States". The parallelism between the manner of exercising control over this extra-territorial industry and that attempted by the federal child-labor law over mining and manufacturing industries is striking.

[6] Calvert: "The Regulation of Commerce". pp. 44, 52.

[7] Bogart: "Economic History of the United States", pp. 117-118.
Taussig: "Tariff History of the United States", pp. 14-15.

[8] *Solomon* v. *Arthur*, 102 U. S. 208; *American Net & Twine Co.* v. *Worthington*, 141 U. S. 468; *Benzinger* v. *U. S.*, 192 U. S. 38.

[9] That tariff legislation combines power to regulate commerce and taxing power, see Freund: "Police Power", p. 63.

very fact of the unity of the United States in the face of any foreign state or power. Such is the doctrine expressed by Justice Gray in the authoritative case of *Fong Yu Ting* v. *The United States*.[10] In that opinion all the cases upon right of entrance of aliens are collated, together with an elaborate review of the commentaries and authorities. The court declared that: "The right to exclude or expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace" is "an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare." That it is in principle distinct from and independent of the right to regulate foreign commerce would seem to flow directly from the course of adjudication of all the oriental immigration cases.[11]

It must be concluded that while the course of adjudication of cases involving the Congressional power over foreign commerce certainly recognizes a "full and complete" power in Congress extending even to absolute and universal prohibition on grounds solely of public policy, it furnishes no secure foundation for the same construction of the power to regulate interstate commerce. In the former sphere Congress is exercising a power which is affected with, when it is not integrally combined with, its sovereign power of governing our political relations with foreign nations. In the latter sphere the exercise of its power of regulation touches the powers and rights of the constituent states to which it bears a strict constitutional relationship and which have a residual if not a reciprocal control in our constitutional system.[12] The limitation that this latter fact involves cannot be too strenuously insisted upon, for the Supreme Court itself has upon more than one occasion[13] let slip remarks in *obiter dicta* identifying the extent and character of the two powers.

[10] 149 U. S. 698.

[11] The line of cleavage had also been previously intimated in *People* v. *Compagnie Generale Transatlantique* (107 U. S. 59) if, indeed, the decision of that case did not involve this distinction. And in the more recent decision of *Oceanic Navigation Company* v. *Stranahan* (214 U. S. 342) the court in sustaining the Act of Congress of March 3, 1903, establishing rigorous health standards for alien immigrants and imposing some really burdensome duties and liabilities upon steamship companies in order to provide a thorough enforcement of the law fully accepts and reaffirms the above principle. It declared: "In effect, all the contentions pressed in argument concerning the repugnancy of the statute to the due process clause really disregard the complete and absolute power of Congress over the subject with which the statute deals."

[12] This view is expressed by C. J. Fuller in the dissenting opinion in the *Lottery* case, 188 U. S. 373-374. It rests, of course, upon the 10th Amendment.

[13] *Gibbons* v. *Ogden*, 9 Wheat. 187; *The Lottery Case*, 188 U. S. 321; *Crutcher* v. *Kentucky*, 141 U. S. 471. In these opinions the control over interstate commerce is declared to be upon the same plane as that over foreign commerce, though in neither case was the latter power in question.

The opinions in *Buttfield* v. *Stranahan*[14] and *Brolan* v. *The United States*[15] however negative that assumption.

But although the two powers are theoretically and logically separable, on account of the difference in the respective spheres in which they operate,[16] so that the power to regulate interstate commerce cannot be construed in reason and has not been interpreted in law to extend to an absolute and universal prohibition, there are none the less very good and sound reasons why it may be construed to extend to such regulation as is based not strictly upon the police power in the sense of health, morals, safety, sanitation measures[17] but upon grounds of public policy. This view has already been stated most succinctly in an opinion by Judge ROGERS in the United States Circuit Court.[18] He says, speaking of the power of Congress to regulate interstate commerce: "the commerce power is plenary, is not confined or limited by the scope of the ordinary police powers as they are exercised by the state, but is restrained and limited only by the Constitution itself." There would seem to be no basis in reason or in the accepted tenets of constitutional construction why the regulatory power over interstate commerce which is granted in the same clause of the Constitution and in the same terms as the regulatory power over foreign commerce should not be interpreted to extend thus far, even though the peculiar relation of the latter to the sovereign power to govern foreign relations may make it effective still further. It is, on the other hand, a powerful argument in favor of such a construction upon the the power to regulate interstate commerce. If one of two powers, each of which is granted in the same terms, is absolute, it furnishes an excellent presumption that the other is not narrowly relative, but relative only to the most fundamental principles of polity and of justice.

Of the instrumentalities of interstate commerce the first to receive the attention of Congress was the famous Cumberland Road;[19] but

[14] 192 U. S. 492.

[15] 236 U. S. 216; where it is laid down that: "The very postulate upon which the authority of Congress to absolutely prohibit foreign importations as expounded by the decisions of this court rests is the broad distinction between the two powers."

[16] See Prentice: "The Federal Power over Carriers and Corporations", p. 147; and Judson: "The Law of Interstate Commerce", pp. 5-6.

[17] Calvert: "Regulation of Commerce", pp. 52-53 is skeptical about this. But Heisler "Federal Incorporation" argues in favor of such a construction of the power, at least by necessary implication (pp. 62-69).

[18] The citation has been lost; but see for statements similar though not quite so specific: *Sherlock* v. *Alling*, 93 U. S. 99, 103 (by Justice Field); *Employers' Liability Cases*, 207 U. S. 526 (dissenting opinion by Justice Moody); *Second Employers' Liab. Cases*, 223 U. S. 47, (in opinion by Justice VanDevanter, points "3" and "4".

[19] Provided for by Act of March 29, 1806; U. S. Stat. at Large II, 357. The road was constructed and kept in repair by federal agents and from federal appropriations.

the first adjudication of the extent of federal control came in a controversy over the respective powers of the state and national Governments concerning the navigation of waters within the territorial limits of a state. In *Gibbons* v. *Ogden*[20] the right of a state to grant an exclusive privilege to operate steamboats in the navigable waters lying within its boundaries was denied by the Supreme Court. In the course of a painstaking analysis of the extent and character of the commerce power the court said: "It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any foreign nation to which this power does not extend. It has been truly said that 'commerce' as this word is used in the Constitution is a unit every part of which is indicated by the term. If this be the admitted meaning of the word in its application to foreign nations it must carry the same meaning throughout the sentence and remain a unit, unless there be some plain, intelligible cause which alters it."

The court found no such "plain, intelligible cause" and so held that the states had no power to grant exclusive franchises in this field reserved to the control of Congress. But if the states can grant no exclusive franchises to engage in foreign or interstate commerce then on what ground are special franchises from states to engage in that trade upheld? The difference is that exclusive franchises are a hindrance and burden while special or corporate franchises have tended, during a certain period, to promote the growth and prosperity of that commerce. In the former case it could not in reason be held that such a franchise might be operative until Congress took direct adverse action; in the latter case the view might be taken that the silence of Congress is a permission that franchises and corporate liabilities acquired under state action may be operative until Congress takes some positive action to exercise in a similar manner its paramount authority. This is because in the former case the state action is quite inconsistent with any construction that might be put upon the inaction of Congress, whereas in the latter case state action operating up to a point to facilitate rather than to obstruct the course of commerce is interpreted as concurrent to the "negative action" of Congress and conformable to its will. The incapacity of the states to grant exclusive franchises, then, relative to the participation in interstate and foreign commerce, is

The consent of the states through which the road passed was expressly required by the terms of the Act.

[20] 9 Wheat. I.

strong evidence of the contingency of their right to grant any franchises exercisable in interstate commerce.

The principle of *Gibbons* v. *Ogden* was somewhat modified by subsequent cases[21] so that the net development before the Civil War of the law concerning interstate ferriage may be stated as follows: the entire subject of rules and regulations for its conduct was considered of a local nature and under the concurrent, perhaps exclusive, control of the states so long as no obstructions were placed upon interstate communication. The second stage in the growth of the federal power over the subject is illustrated by the case of the *Gloucester Ferry Company* v. *Pennsylvania.*[22] In this case a state attempted to tax a foreign ferriage corporation whose boats in the regular course of business touched at wharves within its jurisdiction. The state was denied the power so to tax these instruments of interstate commerce upon the ground that it might operate to impose discriminatory burdens upon that commerce. But it was still maintained that the states under their police powers might make all needful regulations for navigation, even requiring licenses where no tax was connected with the same.

A third stage in the development of the law governing the operation of interstate ferries was foreshadowed by the decision in *St. Clair* v. *Interstate Transfer Company.*[23] It was there held that a state could not require a license for railroad transports, which were distinguished from ferries,[24] notwithstanding the fact that no pecuniary burden was placed upon a licensee, since these boats were in effect parts of an interstate transportation system in a general rather than a merely local sense. In *New York Central Railroad Company* v. *Hudson County*[25] the problem was definitively settled by an extension of the federal power over the whole subject. In substance, the court has come in these cases to reinterpret the silence of Congress in the matter of licenses or its indirect action[26] in the matter of tolls as evidence of its will to have complete and exclusive control.

It will be recognized from this line of cases that there has been a steady expansion of the federal power over ferries plying across state boundaries which has been in harmony with the change in the

[21] *Fanning* v. *Gregoire,* 16 How. 524; *Conway* v. *Taylor,* 1 Black. 603.

[22] 114 U. S. 196. This case follows *St. Louis* v. *The Ferry Company,* 11 Wall. 423, and *Wiggins Co.* v. *East St. Louis,* 107 U. S. 365

[23] 192 U. S. 454.

[24] As a lower court had ruled in *New York* v. *New England Transfer Co.,* Fed. Cases No. 10, 197.

[25] *227* U. S. 248.

[26] The court refers to the provisions of the Interst. Com. Act of 1887.

actual objective conditions. In the early days, or the period preceding the immense development of production for interstate markets and a vast network of steam transportation systems, state control of ferries operating across rivers bounding states was not only justifiable but positively more propitious for the extension of such communication than federal regulation on account of the local character and limited scope of the business. But when presently the diversity in regulation and the want of uniformity in service touched the movement of a greatly augmented interstate commerce so closely as to threaten an appreciable obstruction to that commerce, it became necessary to hold that the interference of Congress in a portion of the field displaced by so much the effective range of state regulation. Finally when the interstate commerce had assumed even larger proportions and ferries had become parts of more intricate lines of communication the power of control over interstate ferriage was adjudged complete and exclusive in Congress.

Bridges connecting points in the different states were in the early decades of our history constructed and operated under the supervision of the states, sometimes acting severally, sometimes jointly. As early as the '40s and '50s however, Congress began to take account of its authority over these structures. Its initial step was perhaps a somewhat impolitic one, but it served nevertheless to confirm the power. The Supreme Court in 1851 had held[27] that the Wheeling Bridge across the Ohio River erected under authority of the state of Virginia was a public nuisance[28] in that it constituted a material obstruction to the navigation of the river. Congress was prevailed upon the following year to recognize the bridge as a lawful structure. The court in declaring[29] this act constitutional, therefore, was compelled to hold in effect that the power of Congress was so exhaustive in this field that it might declare that not to be a nuisance which the highest judicial tribunal in the country had declared was such. Relative to the consequences of the act of Congress the court by Mr. Justice NELSON said: "It will not do to say that the exercise of an admitted power of Congress conferred by the Constitution is to be withheld if it appears or can be shown that

[27] 13 Howard 519.

[28] There were several packets regularly plying past Wheeling which could not pass under the span without undergoing expensive alterations and being subject to a continuing burden as long as they operated. It seems pretty clear, moreover, that one of the principal motives for the construction of the bridge was to make Wheeling the head of navigation on the Ohio, and thus cut off the trade of various Pennsylvania cities, particularly Pittsburgh.

[29] 18 Howard 421.

the effect and operation of the law may incidentally extend beyond the limitation of the power."

In the case of the *Newport Bridge Company* v. *The United States*[30] it is affirmed that the control of Congress over bridges between two states is paramount, and that state charters for the construction of such bridges operate by suffrance to this extent: that Congress may regulate, prescribe new requirements, or entirely annul the exercise of franchise rights, whenever such measures are deemed "essential to secure the due protection to the navigation of the river". The bridge company had been incorporated by special legislative enactments of Ohio and Kentucky which empowered it to build the bridge across the Ohio according to certain specifications, but subjected it to such additional requirements as Congress might make. By special acts of 1869 and 1871 Congress twice changed the requirements in respect to span and headway as it had reserved the right to do, but in the latter act it was provided that the United States might be sued in equity for damages caused by the alterations. After the erection of the bridge according to the approved plans the company brought its action for indemnification, which was denied. The court said, "The paramount power of regulating bridges that affect the navigation of navigable rivers of the United States is in Congress. * * * But when power was given to build this bridge it was deemed expedient in the interest of commerce to be more specific, and by reserving the power to withdraw the assent of Congress to what might prove to be an obstruction to navigation, to imply at least a reservation of power to make that unlawful which, while the assent continued, would be lawful." "* * * the (Congressional) resolution of 1869 became * * * the paramount license for the construction and maintenance of the bridge, and the Company by accepting its provisions became subject to all the limitations and reservations of power which Congress saw fit to impose". "The action of Congress is supreme and overrides all the states may do". Herein is contained the essential guarantee that the power of Congress is not merely negative. It is a full, complete, positive power,[31]—power to direct that commerce by the enactment of laws tending to effectuate ends which are deemed desirable for the general well-being. It is not only the power to determine what is injurious and obstructive to the movement of interstate commerce and to remove or counteract such hindrances. It is the power to determine the manner in which the instruments of interstate traf-

[30] 105 U. S. 470.

[31] See also *S. Carolina* v. *Georgia* decided shortly previous, 93 U. S. 4.

fic shall be constructed and operated according as expediency and public policy seem to point the way.

The full significance of this doctrine can only be understood in conjunction with the view expressed in the dissenting opinion by Justice Field. He said: "Its regulation (that of foreign and interstate commerce) therefore required such control over our harbors, bays and navigable streams * * * *as might be necessary to keep navigation free from unnecessary obstructions;*[32] and might legitimately extend to making such improvements as would facilitate the passage of vessels, render their anchorage safe, etc. * * * to this extent its power over navigable waters goes under the commerce clause; no further. Unless therefore the free navigation of the public waters is impeded by what a state may do or permit, Congress cannot interfere with its action * * *."

It was this view—this very limited and restricted view—which the majority of the court flatly repudiated. The vigor of statement and cogency of reasoning of the decisions in which the earlier tradition of the commerce power had been set forth were apparently too great to admit of departure from their unmistakable spirit. The clear distinction between the majority and minority views makes this case a singularly important landmark in the development of constitutional interpretation, coming as it did at a critical juncture. After the Civil War had worked out such a radical disturbance in the relative positions of the states and the federal authority in our scheme of government there opened up a new field for constitutional construction. The three new amendments offered great possibilities for constructive statesmanship, through the medium of juristic interpretation. But there was none to take the place of Hamilton, or of Marshall, or of Webster. The trend of constitutional interpretation viewed in its larger aspects was for some time directly away from the earlier tradition. The persistent course was toward preserving the rights and powers of the states so far as might be reasonably compatible with constitutional provisions.

In view of this recognized fact the importance of the decision in the Newport Bridge case becomes clearer. In a period when a large part of the field of organic law was being sensibly modified and shaded by the obscure influence of judicial preconceptions and sympathies of a slightly different blend, the original traditions of the scope and nature of the power over interstate and foreign commerce were preserved. At least this constitutional provision escaped a construction which would have emasculated it so far as positive, constructive direction and control by Congress is concerned.

[32] Italics those of the present writer.

The effect of the decisions in *Gibson* v. *United States*[33] and in *Scranton* v. *Wheeler*,[34] which involved the question of interference with riparian rights by the construction of dikes and piers for the improvement of navigation, was to continue and to re-enforce the view of the regulatory power of Congress adopted in the Newport Bridge case. The positive and comprehensive character of the power is reaffirmed, at least insofar as the power relates to the control over navigation. It is not confined to a merely supervisory function to provide against actual obstructions and the removal of nuisances, in short, to keep the navigable streams which are the paths of interstate commerce unclogged. It extends to whatever action Congress may judge to be in the public interest and tending to facilitate the movement of interstate commerce upon navigable streams.

The Union Bridge case[35] called into question the validity of an Act of Congress known as The Rivers and Harbors Act of 1899, which declared that any bridge or structure causing an unreasonable obstruction to interstate commerce upon navigable streams should, upon determination of the fact by the Secretary of War, be altered or remodelled in such a way as might be prescribed by the Secretary of War, or entirely removed so as to permit reasonably free, unobstructed navigation. Under the authority of this act the Union Bridge spanning the Alleghany River at Pittsburgh was condemned. The court, holding the act to be within the power of Congress to regulate an integral part of interstate commerce declared: "Although the bridge, when erected under the authority of a Pennsylvania charter, may have been a lawful structure, and although it may not have been an unreasonable obstruction to commerce and navigation as then carried on, it must be taken, under the cases cited and on principle, not only that the company when exerting the power conferred upon it by the state, did so with knowledge of the paramount authority of Congress to regulate commerce among the states, but that it erected the bridge subject to the possibility that Congress at some future time, when the public demanded, exert its power by appropriate legislation to protect navigation against unreasonable obstruction." To similar effect in *Louisville Bridge Company* v. *United States*[36] it was decided that even a bridge erected under Congressional sanction without any reservation of power to require alterations and designated as a "lawful bridge" might subsequently be condemned, and not upon the ground of being a dangerous structure,

[33] 166 U. S. 269.
[34] 179 U. S. 141.
[35] 204 U. S. 364.
[36] 242 U. S. 409.

but solely upon the ground of being a present obstruction to navigation. It was stated that: "the Acts of 1862 and 1865 (under which the bridge was constructed) conferred upon appellant no irrepealable franchise to maintain its bridges precisely as it was orginally constructed."

These cases then go no farther than the Newport case, if indeed they go as far. For in these cases Congress made the operation of its enactment or the action of its executive agent contingent upon the actual existence of an unreasonable obstruction to commerce and navigation. There was no evidence of such a fact nor any effort to ascertain whether such a fact existed in the Newport case, and the court held that an inquiry in regard to that fact was unnecessary. Nevertheless, in another light the Union case, at least, may be regarded as an even stronger case than the Newport case, since the Union Bridge Company was required to tear down its bridge altogether, whereas the Newport Bridge Company was only required to make alterations.

Gilman v. *Philadelphia*[37] and *Cardwell* v. *American Bridge Company*[38] involved the power of a state to authorize the construction of bridges over navigable streams which constituted effective blocks to steamboat transportation which was of a local nature, above the points where they were constructed. In both cases the court held that the state had the power mentioned, but only in the absence of legislation by Congress. It was pointed out that where the regulation touched essentially local affairs, as in these cases, it would be presumed that Congress acquiesced therein and recognized the more favorable situation of the states for determining the best policy for such legislation. The state would, for instance, be in a better position to know to what extent the community would be benefitted by unobstructed navigation and to what extent by a connecting bridge.

This doctrine of the difference between that portion of the field which is local in its nature and that portion which is national was well set forth in the earlier case of *County of Mobile* v. *Kimball*.[39] The plaintiffs contracted with a Board of Harbor Commissioners authorized by the Alabama legislature of 1867 to make improvements in Mobile Bay to do a certain job of dredging, and the work being inspected and approved but payment being refused they brought suit. The court, holding that the state or county could not withhold payment on the ground that the statute authorizing improvements to be made in navigable waters was unconstitutional, said: "That

[37] 3 Wall. 713.
[38] 113 U. S. 205.
[39] 102 U. S. 691.

power (the commerce power of Congress) is indeed without limitation. It authorizes Congress to prescribe the conditions upon which commerce in all its forms shall be conducted between our citizens and the citizens of the several states, and to adopt measures to promote its growth and insure its safety. * * * The subjects upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character and admit and require uniformity of regulation, affecting alike all the states; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. * * * The uniformity of commercial regulation, which the grant to Congress was designed to secure against conflicting state provisions, was necessarily intended only for cases where such uniformity is practicable. Where from the nature of the subject or the sphere of its operation the case is local and limited, special regulation adapted to the immediate locality could only have been contemplated. State action upon such subject can constitute no interference with the commercial power of Congress for when that acts the state authority is superseded. Inaction of Congress upon these subjects of a local nature or operation * * * is (rather) to be deemed a declaration that for the time being, and until it sees fit to act, they may be regulated by state authority."

It it clear from this reasoning and that of other cases[40] along the same line, that the power of the state over these "mere aids to commerce" which are partly of a local character is not concurrent with the power of Congress but exists only during the inaction of Congress. Even if we might assume the state regulations upon such a subject to be quite adequate, tending to conserve and promote the public interest and the commercial development of the country as a whole there is nothing to prevent Congress from assuming its constitutional power over the subject and rendering the state regulations inoperative.

In the *Covington Bridge* case[41] the question for decision was whether a state might regulate tolls over an interstate bridge con-

[40] *Cooley* v. *Port Wardens*, 12 How. 299: *Escanaba etc. Co.* v. *Chicago*, 107 U. S. 683; *Morgan* v. *Louisiana*, 118 U. S. 455; *Ouachita Packet Co.* v. *Aiken*, 121 U. S. 444; *Sands* v. *Manistee River Co.*, 123 U. S. 288, 295; *Harman* v. *Chicago*, 147 U. S. 396, 412; *Gulf, Col. Etc. R'y* v. *Hefley*, 158 U. S. 98, 104; *New Haven R. R.* v. *New York*, 165 U. S. 628, 632-3; *M K. & T. R'y* v. *Haber*, 169 U. S. 613, 626; *Compagnie Francaise* v. *Bd. of Health*, 186 U. S 380; *Asbell* v. *Kansas*, 209 U. S. 251; *Rock Island R'y Co.* v. *Arkansas*, 219 U. S. 453; *Mo. Pac. Ry.* v. *Larabee Mills*, 211 U. S. 612; *So R'y Co.* v. *Reid*, 222 U. S. 424, 436-7; *Valley S. S. Co.* v. *Wottawa*, 244 U. S. 202, 204.

[41] 154 U S. 204.

structed with the approval of Congress by a corporation chartered jointly by that state and a sister state. The court held that the whole subject of the charges of interstate bridges rests exclusively in Congress. In the course of its opinion the court stated: "It follows that if the state of Kentucky has the right to regulate the travel upon such bridge and fix the tolls, the state of Ohio has the same right. * * * Congress, and Congress alone, possesses the requisite power to harmonize such differences, and enact a uniform scale of charges. * * * " The principle of this case is not peculiar. It is but the application of the now well-established doctrine[42] that Congress has exclusive control over fares and tariffs for interstate transportation. And it is the final correction of some of the reasoning put forth in the early ferry cases previously considered. It will be noted that these modifications are persistently in the direction of making the power of Congress, within its constitutional field, i. e. within the bounds of what constitutes interstate commerce, more and more exhaustive, minute, and effective.

In conclusion, it should be recognized that this entire class of cases involving federal control over ferries and bridges between states, while resting upon the power of Congress to regulate interstate and foreign commerce, constitute more or less a class apart from other branches of regulation inasmuch as they concern "the navigable waters of the United States." Such waters have from the first been regarded as, in some sort, constituting a "natural transportation medium" for commerce among the states and with foreign nations. Moreover, the peculiar relation of the waterways to the national defense was not overlooked.[43] For these reasons navigable waterways have been treated as a special province for the regulating power of Congress. This is evidenced by the early delegation of manifold powers to the Secretary of War, reaching in several directions to the determination of minute details, with respect to the rules and conditions of navigation. In the execution of the numerous 'Rivers and Harbors' acts, of which the first of importance was passed as early as 1826, and in carrying out the provisions of special[44] and general[45] acts conferring supervision over the location and erection of structures over navigable waters, there has developed a remarkable body of federal administrative law. Far from militating against such a construction of the regulatory power of

[42] To similar effect had been the decision in the *State Tonnage Tax* cases, 12 Wall. 216.

[43] Report of Secretary of War, 1824. H. Doc. 18th Cong., 2nd Ses., Vol. 1, No. 2, 55.

[44] Act authorizing construction of East River Bridge, March 3, 1869.

[45] Act relating to construction of bridges over Mississippi and Ohio rivers, June 4, 1872.

Congress as would sanction its exercise in determining the conditions upon which corporation franchises may be exercised in interstate commerce the exertion of its power to such an extent over this portion of the field tends to give support to its exertion, when the conditions require it, in that portion with which we are herein directly concerned.

The decisions covering the manner of conduct of interstate telegraph companies are singularly unsatisfactory. They exhibit a trend of opinion decidedly hesitant or backward in comparison with that of the bridge and railroad cases with which they were declared exactly parallel at the outset. The development of the law governing these instrumentalities of interstate commerce may be conveniently divided into four steps:

1. State laws imposing taxes in any form upon the interstate business of a telegraph company have of course been declared invalid,—*Western Union Telegraph Company* v. *Texas*.[46] In that case the court took occasion to remark, "A telegraph company occupies the same relation to commerce as a carrier of messages, that a railway company does as a carrier of goods." It was held accordingly to fall within the rule of: *Case of the State Freight Tax*,[47] *The State Tonnage* cases,[48] *Passenger* cases.[49]

2. The cases involving more particularly state regulation of the manner of conduct of the business, such as the transmission and delivery of interstate messages started out with the rule that such regulation of interstate messages is void. And apparently it would have been held invalid even for the manner of delivery within the state of interstate messages, for the rule was adopted upon the view that the manner of conduct of the interstate telegraphic business is a subject requiring a uniform national rule and so exclusively within the sphere of federal authority.[50]

3. This was later modified to make the subject fall within the concurrent authority of the state, so far, but so far only, as the order of transmission and manner of delivery of interstate messages affected the conduct of the company within the state. Thus the original sending of messages from a

[46] 105 U. S. 460.
[47] 15 Wall 232.
[48] 12 Wall 204.
[49] 7 How. 283.
[50] *Western Union Telegraph Co.* v. *Pendleton*, 122 U. S. 347.

state office or the delivery of interstate messages received at an office within the state and addressed to a person there were matters of state control in the absence of federal regulation, at least, so long as no onerous burden was placed upon the company. So it was held in the *Western Union Telegraph Company* v. *James*.[51] As the court said of the Georgia statute in that case, "It can be fully carried out and obeyed without in any manner affecting the conduct of the company with regard to the performance of its duties in other states." It should be recognized that the regulation was more burdensome in the Indiana case than in the Georgia case. Yet in neither case did the court find it unreasonable. Hence the conclusion that there was a different principle applied is unavoidable. The *James* case was followed in every essential respect by the case of the *Western Union Telegraph Company* v. *Commercial Milling Company*[52] though the Michigan statute involved there was a regulation of the liability of telegraph companies to the senders of messages sent out of the state.

4. But finally this principle of concurrent power of the states over interstate messages was extended to cover the regulation of conduct of the companies relative to the handling of interstate messages beyond the boundaries of the state where they were dispatched. Such was the effect of upholding the Virginia statute in *Western Union Telegraph Company* v. *Crovo*.[53] Although that statute contained a clause regulating the priority of delivery beyond the bounds of the state of messages sent from within the state, as that was not a point at issue the court refused to rule on the question, declaring that in any case this clause was separable from the rest of the statute. But it did decide that the requirement that the telegraph company should deliver at points outside of the state messages sent from within the state "as promptly as practicable" was a valid police regulation by Congress covering that subject.

Thus in the departure from the rule of the *Pendleton* case that this subject is one requiring uniformity of regulation and is exclusively given to authority of Congress, there is a gradual tendency to make the departure more radical and incisive. First, the state

[51] 162 U. S. 650.
[52] 218 U. S. 406.
[53] 220 U. S. 364.

law directing the manner of delivery of interstate messages addressed to persons within the state is upheld. Second, a state law fixing the liability of parties contracting for transmission of an interstate message is upheld. And third, a state law prescribing the manner of delivery of interstate messages at points outside of the state is held valid. It must be remarked in connection with the last decision that the required manner of delivery was not onerous. Though it was expressly recognized by Judge PECKHAM in the *James* case that there was no attempt "to enforce the provisions of the state statute beyond the limits of the state," that is the very thing that was sanctioned in the last, the *Crovo* case. Whereas in the first case, it was recognized that the statute could "be fully carried out and obeyed *without in any manner affecting the conduct of the company with regard to the performance of its duties in other states;*" the decision in the Virginia case went upon the very point that the conduct of the telegraph company in another state was not in accordance with the laws of Virginia.

Nevertheless the important point is that in all these cases reservation has been made of the power of Congress to intervene and exercise a paramount authority whenever it deems uniform regulation expedient. And in spite of the tendency of these late cases it is hardly likely that the court will fail to apply the principle it recognized in the Texas case of the virtual identity in the power of Congress over railroads and telegraph lines.

The law involving express companies has had a somewhat later and more uniform development. This was probably due to the absence for a long time of attempts at vigorous state regulation. It has been the experience of all forms of regulation under the commerce power, practically without exception, that the federal power has been exerted only after some experimenting with state regulation has revealed defects or shortcomings to which the national regulation has been applied as a remedy. This has been true of the regulation of express companies also. The first really important case was that of *Crutcher* v. *Kentucky*[54] decided in 1891. The court held unconstitutional a statute requiring that all foreign express companies desiring to do business within the state should obtain a license to which a small fee was attached and should otherwise fulfill certain conditions. This decision manifestly advanced a step beyond the doctrine upheld in a long line of cases[55] that a state cannot tax

[54] 141 U. S. 47.

[55] *Brown* v. *Maryland*, 12 Wheat 419; *Railroads Gross Receipts Case*, 15 Wall. 284; *Texas Telegraph Case*, 105 U. S. 460; *Robbins* v. *Shelby County*, 120 U. S. 489; *LeLoup*

"interstate commerce in any form, whether by way of duties laid on the transportation * * *, or on the receipts * * *, or on the occupation or business of carrying it on."[56]

The purpose which the state intended to effectuate by this law was clearly to safeguard the interests of creditors and those who having dealings with express companies might be residents within the state. It was not so much a taxation measure as a measure making for the security of the commerce and industry in which its citizens might be involved. Nevertheless it was not a local police measure within the meaning of the decisions in *New* v. *Milne*[57] or *Smith* v. *Alabama*.[58] Thus the court declared: "This (law) of course embraces interstate business as well as business confined wholly within the state * * * If the subject was one which appertained to the jurisdiction of the state legislature, it may be that the requirements and conditions of doing business entirely within the state should be promotive of the public good. It is clear, however, that it would be a regulation of interstate commerce in its application to corporations or associations engaged in that business, and that is a subject which belongs to the jurisdiction of the national and not the state legislature. *Congress would undoubtedly have the right to exact from associations of that kind any guarantees it might deem necessary for the public security and the faithful transaction of business;*[59] and as it is within the province of Congress it is to be presumed that Congress has done or will do all that is necessary and proper in that regard. * * * *To carry on interstate commerce is not a franchise or a privilege granted by the state;* it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business cannot have the effect of depriving them of such right, *unless Congress should see fit to interpose some contrary regulation.*"[60]

Such a paragraph has very strong implications. The parts italicized would seem to make direct admission of the power in Congress to declare the rule of stockholders' liability, and to determine under what conditions the franchise to transact interstate commerce shall be exercised. Nevertheless it should not be overlooked that there is

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v. *Mobile*, 127 U. S. 640; *Welton* v. *Missouri*, 91 U. S. 275; *Stockard* v. *Morgan*, 185 U. S. 31; *State Freight Tax*, 15 Wall 232; *Pickard* v. *Pullman Co.*, 117 U. S. 34; *Waling* v. *Michigan*, 116 U. S. 446; *McCall* v. *California*, 136 U. S. 104; *Western Union T. Co.* v. *Kansas*, 216 U. S. 1.

[56] Chief Justice Fuller in *Lyng* v. *Michigan*, 135 U. S. 161.

[57] 11 Peters 119.

[58] 124 U. S. 465.

[59] Italics in this quotation by the present writer.

[60] Italics by the present writer.

nowhere any intimation of the sovereign power to *create* corporations which may engage in interstate commerce. It is only by analogy and inference, however clear and strong that analogy and inference, that we may get from these sentences a concession that Congress has the constitutional power to pass an exclusive federal incorporation law.

Subsequently in the important ruling of *Adams Express Company* v. *Ohio*[61] there was established a taxation doctrine which, while theoretically it appears to conserve the powers of the states in practice has not been permitted to affect the relative authority of the state and federal governments over these instruments of interstate commerce. An Ohio statute of 1893 provided that such a proportion of the total assets of every express company as its gross receipts in Ohio bore to the gross receipts from all its business should be subject to the property tax of Ohio. The majority of the court took the view that such a measure was a tax on property and not on receipts and thus was not a direct burden on interstate commerce and could not be used as a means to its regulation. The rule announced[62] by the court may be taken as the accepted general rule today[63] and a proper construction of *Western Union Telegraph Company* v. *Kansas*[64] and *Southern Railway Company* v. *Greene*[65] will prove them not to be exceptions. But these two cases do nevertheless modify the doctrine in the sense of restricting its logical extension. It involves very clearly an application of the economic theory of income capitalization as value determinator. And this results, as was recognized by the majority of the court in the two cases last mentioned and by the minority of the court in the Ohio case, whether exercised in the form of business licensing or property taxation in nothing less than a tax upon the profits of interstate commerce. It is a limitation placed by a state upon the franchise to engage in interstate business; but it is now settled that where such measures operate as a distinct burden upon interstate commerce they will not be sustained. In any

[61] 165 U. S. 194.

[62] "Although the transportation of the subjects of interstate commerce or the receipts received therefrom, or the occupation or business of carrying it on cannot be directly subjected to state taxation, yet property belonging to corporations * * * engaged in such commerce may be; and whatever the particular form of the exaction, if it is essentially only property taxation it will not be considered as falling within the inhibition of the Constitution".

[63] The doctrine was previously laid down in *W. U. Telegraph Co.* v. *Mass.*, 125 U. S. 530; *Pullman Co.* v. *Penna.*, 141 U. S. 18, and in *Postal Tel. Co.* v. *Adams*, 155 U. S. 688. It is followed in form if not in substance in *N. Y.* v. *Roberts*, 171 U. S. 658; *Reymann Brewing Co.* v. *Brister*, 179 U. S. 445, and *Adams Exp. Co.* v. *N. Y.*, 232 U. S. 14.

[64] 216 U. S. 1.

[65] 216 U. S. 400.

event, doctrines formulated respecting the law of taxation have only a very restricted bearing in other fields of action, e. g., commerce regulations.

The first step in the positive regulation of express companies by Congress was to govern their relations to shippers. The application of this law formed the basis of contention in *Adams Express Company* v. *Croninger*[66] decided in 1912. The shipper's receipt limited the liability of the express company to $50.00 in accordance with the published tariff which provided graduated rates according to the value of shipments. The law of the jurisdiction did not permit carriers to contract away any of their liability for the delivery of shipments. By the Carmack Amendment to the Hepburn Act of 1906, Congress had declared that the rules of liability should be uniform on all interstate shipments and had provided that the carrier "should be liable for any loss * * * or injury to such property caused by it," and furthermore that "no contract * * * should exempt such carrier * * * from the liability hereby imposed." The court held that the tariff of the company was not inconsistent with this law, and that the regulation of Congress superseded all state rules and regulations. The court said "that the constitutional power of Congress to regulate commerce among the states and with foreign nations comprehends power to regulate contracts between the shipper and the carrier of an interstate shipment by defining the liability of the carrier for loss, delay, injury, or damage to property, needs neither argument nor citation of authority."

It will be seen from the character of the regulation here in question that Congress has occupied at least partially the field of regulation marked out in the Crutcher decision. If it may go thus far unquestioned ("need neither argument nor citation of authority") may it not go further when conditions in the judgment of Congress demand it in protecting all parties who deal with these corporate agencies of interstate commerce? A federal incorporation law, be it remembered, would be designed to serve substantially the same end: to safeguard the interests of not only those who confide their goods to express companies for transmission but also those who entrust their funds to such corporations for investment.

[TO BE CONTINUED]

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[66] 226 U. S. 491.